

NO. 89-61

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IN THE SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1989

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UNITED STATES OF AMERICA, PETITIONER

-VS-

FILIBERTO OJEDA RIOS, ET AL., RESPONDENTS

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RESPONDENTS' OPPOSITION TO  
PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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# QUESTION PRESENTED

Whether the Second Circuit Court of Appeals erred in affirming the suppression of certain tape recorded fruits of electronic surveillance pursuant to 18 U.S.C. Sec.2518(8)(a), where the government delayed judicial sealing said tapes for at least 82 days and failed to provide a satisfactory explanation for such delay, and where the record further showed the government's use of inadequate custodial procedures, a secret cassette recording system, intentional destruction of original surveillance tapes, a pervasive practice of "live-monitoring," and perjury by government agents.

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# STATEMENT OF THE CASE

During the course of a massive 17-month electronic surveillance investigation in Puerto Rico, government agents recorded 1,011 reels and cassettes which were eventually judicially sealed. The operation was conducted between April 27, 1984, and August 30, 1985 at various locations on the island. Gov. App. 18a. The surveillance included microphones placed in private residences and offices, wiretaps of private and public telephones, and a bug placed inside a private automobile.

The initial Title III order, entered on April 27, 1984, authorized interception and recording of oral communications at the residence of Filiberto Ojeda Rios in Levittown, Puerto Rico, and wiretapping of several public telephones across the street from the residence. Gov. App. 3a. That order was extended twice. The final extension expired July 23, 1984. The tapes obtained from the Levittown surveillance were judicially sealed on October 13, 1984, 82 days after the expiration of the final extension order and 96 days after the surveillance actually ceased. Gov. App. 4a.

Among the other surveillance sites were two public telephones in Vega Baja, Puerto Rico. A Title III order authorizing the wiretap of those telephones was issued January 18, 1985. It expired February 17, 1985. The government obtained a new order for those same telephones on March 1, 1985. It was extended twice, and finally expired May 30, 1985. All tapes from the Vega Baja pay telephone wiretaps were sealed June 15, 1985, 118 days after the expiration of the January 18, 1985, order. Gov. App. 5a.

During three years of pre-trial proceedings, the sixteen defendants moved to suppress the fruits of the electronic surveillance for numerous government violations of

the law, including: (1) violation of the statutory sealing requirement, 18 U.S.C. Sec. 2518(8)(a); (2) use of a secret cassette recording system; (3) intentional destruction of original surveillance tapes; (4) pervasive use of the practice of "live-monitoring"; and (5) perjury by government agents. Def. C.A. App. 1, 10, 17.

On July 7, 1988, the district court issued a ruling suppressing all tapes from the Levittown residence and public phones and those tapes from the Vega Baja public phones which were obtained pursuant to the January 18, 1985, order. In both instances, the court ordered suppression because of the government's failure to comply with the statutory sealing requirement. Gov. App. 66a, 83a.

The Court of Appeals for the Second Circuit, ruling on the government's interlocutory appeal, affirmed the suppression of the Levittown and Vega Baja tapes. Gov. App. 11a. The court of appeals examined whether the government had provided the statutorily-required "satisfactory explanation" for each delay. It held that neither the eighty-two or ninety-six day delay with respect to the Levittown tapes nor the 118-day delay in sealing the Vega Baja telephone tapes was satisfactorily explained and upheld the suppression of both sets of tapes for that reason. Gov. App. 13a, 14a.

#### SUMMARY OF REASONS FOR DENYING THE PETITION

In addition to the reasoning adopted by the Court of Appeals for the Second Circuit for affirming suppression of the Levittown tapes and Vega Baja telephone tapes for failure of the government to supply a "satisfactory explanation" for the late sealing of those tapes, "any ground properly raised below may be urged as a basis for affirmance of the Court of Appeals' decision." Whitley v. Albers, 106 S. Ct. 1078, 1088 (1986). Numerous such reasons were raised by the respondents both in the district court and in the court of appeals, including the failure of the government to establish the integrity of the tapes, the independent grounds for suppression based upon the government's use of a secret recording system which created "bootleg cassettes" and the government's practice of listening without recording conversations in violation of Title III's stringent requirements, and perjury by government agents.

The factually complex record underlying these independent grounds for suppression makes this an inappropriate case for review on certiorari because the legal issues are intricately fact-bound and tied to the procedures involved in this particular investigation.

#### REASONS FOR DENYING THE PETITION

Respondents ANGEL DIAZ-RUIZ, ORLANDO GONZALEZ CLAUDIO, FILIBERTO OJEDA RIOS, AND JORGE FARINACCI GARCIA fully adopt the reasons for denying the petition contained in the brief in opposition to certiorari submitted by co-defendants Yvonne Melendez-Carrion, Isaac Camacho Negron, Elias Castro Ramos and Hilton Fernandez Diamante. In addition, they point out that if this Court grants certiorari and rejects the rationale of the court of appeals, it will become necessary for the Court to examine the alternative grounds for suppression of the tapes, all of which were which argued by the respondents both in the district court and on appeal. "Any ground properly raised below may be urged as a basis for affirmance of the Court of Appeals' decision." Whitley v. Albers, 106 S. Ct. 1078, 1088 (1986), citing United States v. New York Telephone Co., 434 U.S. 159, 166 (1977). The alternative grounds for suppression raised below are addressed in the following pages.

#### I. THE GOVERNMENT HAS NOT ESTABLISHED THE INTEGRITY OF THE TAPES

The district court, which suppressed the tapes for violation of the immediate sealing requirement under Section 2518(8)(a), found it unnecessary to decide whether or not the government had satisfied its heavy evidentiary burden of establishing the integrity of tapes which had been suppressed. The court explicitly refused to consider that issue, stating that "...because the Court has suppressed the Levittown residence and payphone tapes due to the excessive delay in sealing, these tapes are not considered in the instant analysis of the integrity of the tapes." Gov. App. 30a, n.3. The court declined to reconsider that footnote when urged to do so by a government motion for "clarification

and reconsideration." Def. C.A. App. 120. The court of appeals, in affirming the district court ruling, similarly avoided the factual issue of the integrity of the suppressed tapes.

However, the court of appeals noted that "Our decisions have fully recognized the importance of the integrity of the underlying tape, an importance that in an era of increasingly sophisticated techniques cannot be overemphasized." Gov. App. 6a-7a. The court of appeals cited this Court's decision in United States v. Giordano, 416 U.S. 505, 527 (1974) and emphasized that "the technological advances that have occurred in the fifteen years since the Giordano decision, see G. Marx, Undercover: Police Surveillance in America 206-33 (1988)...render the Court's view in that case all the more pertinent." Gov. App. 3a.

The significance of the government's proving integrity of the tapes was addressed at length in United States v. Gigante, 538 F.2d 502, 505 (2d Cir. 1976), where the government conceded that tapes had not been judicially sealed for periods ranging from eight to twelve months, but claimed that suppression was not warranted because the defendants had been unable to present evidence of actual tampering:

"To demand such an evidentiary showing, however, would vitiate the Congressional purpose in requiring judicial supervision of the sealing process. Tape recorded evidence is uniquely susceptible to manipulation and alteration. Portions of a conversation may be deleted, substituted, or rearranged. Yet, if the editing is skillful, such modifications can rarely, if ever, be detected. The judicial sealing requirement, therefore, provides an external safeguard against tampering with or manipulation of recorded evidence. The sealed tapes become 'confidential court records' and cannot be unsealed in the absence of a subsequent order. When these safeguards are compared with the haphazard procedures employed in this case, the wisdom of Congress becomes manifest." 538 F.2d 502, 505.

The extensive record in this case fully demonstrates the government's failure to meet its burden on the integrity of the suppressed tapes. The district court held ten (10) months of hearings, from September 1, 1987, through June, 1988, on Title III issues in this case. Testimony was taken from agents and civilian employees of the FBI, from technical experts, and from lay witnesses regarding the creation, handling, labeling, storage, and eventual sealing of the tapes created. The testimony revealed that procedures used by the agents seriously violated the safeguards provided by statute. The record indicates that serious flaws in the government's custody procedures prior to sealing routinely provided opportunities for tampering. Testimony about anomalies on the suppressed tapes was presented by the respondents which suggested that such tampering actually occurred. This evidence, which relates directly to the integrity of the tapes, was not considered by the district court when suppression was ordered.

A. Inadequate Custodial Procedures Created Widespread Opportunities for Tampering by the FBI

Many circuit courts of appeals have recognized that proper handling and securing of Title III recordings are essential to minimize opportunities for tampering prior to judicial sealing, e.g. United States v. Mora, 821 F.2d 860, 869 (1st Cir. 1987), United States v. Rodriguez, 786 F.2d 472, 478 (2nd Cir. 1986), and United States v. Johnson, 696 F.2d 115, 125 (D.C. Cir. 1982). In this case, the government failed to establish procedures adequate for the prevention of tampering, and then failed to follow even those inadequate policies which had been adopted. The lack of adequate procedures necessarily undermined the integrity of the tapes.

In marked contrast to procedures followed in MORA and

Rodriguez, in which tapes were placed in heat-sealed envelopes at the monitoring sites immediately after being recorded, the monitoring agents in this case were specifically instructed not to seal the "504 envelopes" which served as containers for the recorded tapes. Rec. 10/9/87 Tr. 223-224; Gov. Exh. 375A, p. 4. Often a number of days passed before the envelopes were informally sealed by the electronic surveillance ("ELSUR") Clerk. Thus, anyone in the FBI with access to a 504 envelope who chose to remove the tape and alter it prior to sealing by the ELSUR Clerk was free to do so.

Even after informal "sealing" by the ELSUR Clerk, original reels were removed from their 504 envelopes without any documentation of that fact. The ELSUR room log indicated that unidentified tapes had been taken from that location prior to judicial sealing with no explanation or documentation provided. Such unwarranted and undocumented removal of tapes before the long-delayed judicial sealing provided substantial and needless opportunities for government tampering.

The unreliability of the custody procedures was demonstrated during the suppression hearings when a 504 evidence envelope was opened which purportedly contained original reel #52 recorded at Levittown telephone 784-9625. It actually contained a cassette tape, not a reel. Neither the monitoring agent nor any other government official had any explanation. D. App. 232-249. 1/

Finally, the chain-of-custody documents introduced in evidence contained anomalies casting considerable doubt on the accuracy and reliability of those records as a whole. Dates were inaccurately specified, agents not clearly identified, and in certain instances documentation appeared to have been non-contemporaneously created, in violation of

the FBI's own procedures.

B. The Physical Characteristics of the Tapes  
Raise Doubts About Their Reliability  
and Authenticity

During the suppression hearings, the respondents presented evidence of tape anomalies which undermine the claimed integrity of the suppressed tapes. Among other evidence, was the unrefuted testimony that many of the so-called "duplicate original" 2/ tapes contained undocumented stop/start events. These appeared to be instances in which recording was stopped and then re-started without any corresponding notation on the FBI monitoring logs. 1/ The government's own expert, Ernest Aschkenasy, agreed that such undocumented stop/start marks are signs suggestive of falsification. Rec. 5/4/88 Tr. 167. While Aschkenasy speculated about possible innocent explanations for the presence of such marks, the record is barren of support for any such explanation. It is noteworthy that Mr. Aschkenasy never disputed the fact that stop/start marks were found on the tapes and never testified that tampering had not occurred.

Evidence introduced at the hearings raised significant questions regarding the originality of the suppressed recordings. Mr. Aschkenasy examined only ten "original" tapes, of which five were suppressed Levittown or Vega Baja tapes. As Aschkenasy himself acknowledged, findings regarding originality could not properly be extrapolated to any tapes which had not been examined. D. App. 254-257. Yet, the district court erroneously used the limited findings from the ten "original" tapes to draw conclusions about the originality of the non-suppressed tapes as a whole.

Problems of integrity of the Levittown tapes were demonstrated by evidence regarding Reels #6 and #7 which were

recorded in the Levittown residence. The evidence from an inadvertently retained bootleg cassette, see infra Sec. II.A, established that there was a gap of only 1.27 seconds between the conversation recorded at the end of Reel #6 and the continuation of that conversation at the start of Reel #7. Earlier testimony had established that it was physically impossible to change reels of tape within that limited time period. Rec. 12/2/87 Tr. 93-96. Thus, the contents of the two reels strongly suggested editing or alteration of the "original" Reel #7, possibly involving recordation of material from a bootleg cassette onto Reel #7.

Unable to explain the incongruous evidence, the government offered hypothetical explanations, including that of a supervisory special agent who testified that the brief gap between Reels #6 and #7 could be explained as follows: If no "duplicate original" was made of Reel #6 or was removed from the machine prior to recording, then a new tape ("original" Reel #7) could have been placed on the duplicate machine and activated as soon as Reel #6 ran out. The witness conceded that this speculative theory was inconsistent with his recollection and his own prior testimony, as well as the testimony of all other monitors who testified about these tapes. Rec. 3/1/88 Tr. 143-160.

The government's explanation, if believed, raised additional difficult questions because the government claimed that a tape which had been labelled and preserved as a "duplicate original" was actually a copy. That copy would necessarily have been created at a subsequent unknown time and place, by an unknown person who then mislabelled it as a "duplicate original." However, there was no documentation of any kind that "original" Reel #7 was ever copied. See D. App. 296. Despite these problems, the government made no effort to have its expert test either "original" or

"duplicate original" Reels #6 and #7. Given the absence of government proof, the record utterly fails to establish the "pristinity" of the tapes. 4/

In the district court, the respondents moved to suppress all 1,011 reels of tape and cassettes generated in Puerto Rico during the course of the investigation. However, because the government chose to designate only 166 recordings as "relevant" to its proof in its case-in-chief, the court's ruling applied only to those 166 so-called "relevant" tapes. Thus, the tapes to which the district court's ruling applied constituted only sixteen (16%) per cent of the total generated by the FBI. 5/ This approach wholly avoided consideration of procedures used by the FBI and evidence of tampering which may have existed on so-called "non-relevant tapes." In fact, it permitted government agents and prosecutors to shield from court examination any tapes which were known or suspected of having been altered, edited or otherwise subjects of tampering, simply by designating such tapes as "non-relevant." The respondents were denied the opportunity to show that defects demonstrated by the "non-relevant tapes" compromised the electronic surveillance operation, ignored Title III requirements, and violated the respondents' rights.

In the event that this Court should order a remand, this Court must provide guidance to the lower court in the following areas: (1) whether First or Second Circuit law should be applied; (2) whether the respondents are entitled to examine all of the so-called "original" tapes and/or all of the suppressed tapes to evaluate their overall integrity; (3) whether these indigent respondents are entitled to retain an expert to rebut the Electronic Tape Scanning ("E.T.S.") evidence offered by the government; and (4) whether the respondents are entitled to cross-examine all government

agents who filed affidavits which were relied upon by the district court.

## II. THERE ARE TWO INDEPENDENT GROUNDS FOR SUPPRESSING THE TAPES AT ISSUE ON APPEAL

Apart from the government's violation of the statutory sealing requirement, respondents raised two additional grounds below for suppressing the Title III recordings, including the Levittown and Vega Baja tapes at issue in this petition. First, respondents claimed that the government's conduct in employing a supplemental, secret recording system and then deliberately destroying most of the "bootleg cassettes" 6/ created thereby, warranted suppression of all the tapes. Second, respondents asserted that the government's pervasive practice of "live-monitoring" by eavesdropping without recording, in clear violation of Title III requirements, mandated suppression of the electronic surveillance as a whole. Following evidentiary hearings both motions were denied by the district court. D. App. 49-119. The Second Circuit never reached these issues.

If this Court affirms the Second Circuit Court of Appeals decision upholding the district court's suppression order based upon the government's failure to seal the Levittown and Vega Baja recordings in accordance with the requirements of Sec. 2518(8)(a), the two alternative grounds for suppression asserted by respondents need not be reached by this Court. Assuming arguendo, however, that the Court reverses and vacates the suppression order, the merits of the additional claims must be addressed. Whitley v. Albers, supra. As demonstrated, infra, the district court erred in rejecting these additional grounds for suppressing the subject tapes.

A. The Government's Use of a Secret Recording System and Its Deliberate Destruction of Resulting Tapes Containing Original Material Warrant Suppression.

In addition to the two reel-to-reel tape recorders described by the government in its pretrial disclosures, the FBI utilized a third recording system at each location monitored. The supplemental system used independently operated and separately wired cassette recorders. It could and did record conversations which did not appear on any of the corresponding "original" or "duplicate original" reel-to-reel tapes. 1/ The existence of the separate recording system was deliberately concealed by the government for two years after the arrests of the defendants. 2/

Unlike the reel-to-reel recordings, which were preserved, labelled, and eventually judicially sealed, most of the cassette recordings were intentionally destroyed by the FBI, either by re-using them, or by putting them through a bulk eraser. D. App. 49-52. 2/ The FBI inadvertantly retained a small number of the cassette recordings. They were finally disclosed to the defense over a period of months during the Title III hearings.

The government's claim that the cassette recorders were simply used to make "work copy" cassettes, i.e. additional copies of the material recorded on the reel-to-reels for use by the monitors and supervisory agents, is belied by the record. Of the 39 cassettes which were not destroyed, four correspond to residence (as opposed to telephone) intercepts. 10/ All of those residence cassettes contain additional "bootleg" material that does not appear anywhere on the corresponding "original" or "duplicate original" reel-to-reel tapes. Record, Gov. Exh. 379d, f, g; 439a. 11/ Although FBI monitoring agents testified that, under the procedures which were followed, it would have been impossible

for the cassettes to record additional original conversations which did not appear on the reel-to-reels, it is striking that one hundred percent (100%) of the retained residence bootleg cassettes did contain such original materials, none of which were ever judicially sealed. Applying the logic of the district court, which readily extrapolated from the contents of the 10 "original" tapes to that of the unexamined originals, supra at 13 would have raised grave concerns about the likelihood of original conversations on bootleg cassettes which had been destroyed. Curiously, the district court refused to extrapolate from the tainted residence bootleg cassettes to the likely contents of those bootlegs which had been destroyed by the government agents.

As the district court ruled, there is no way to determine how many other bootleg cassettes contained original material not appearing on any sealed reel-to-reel recording since virtually all of the cassettes have been deliberately destroyed. D. App. 62-63. The district court stated that the government should have preserved all of the cassettes and disclosed their existence to respondents during the early stages of pre-trial discovery. Yet the court refused to suppress the tapes or impose sanctions of any kind upon the government.

The government's egregious misconduct in generating and deliberately destroying bootleg cassettes containing the fruits of electronic eavesdropping warrants suppression of the recordings at issue on two distinct grounds. First, the inadvertently-retained bootleg cassettes establish that an unknown number of recorded original electronic interceptions from the Levittown residence were not judicially sealed or preserved in any way. The district court erroneously denied this claim on the ground that the cassettes themselves were not designated by the government as "original" evidence.

Ruling, Gov. App. 7. Yet the government is not free to pick and choose which original recordings it will submit for judicial sealing. Title III mandates the preservation and sealing of all original recordings. 18 U.S.C. Sec. 2118(8)(a). Thus, there is no question that the bootleg cassette operation violated the strict preservation and sealing requirement of the statute.

The government's deliberate destruction of its bootleg cassettes severely undercut the respondents' ability to establish tampering and listening without recording. Moreover, it prevented them from challenging the government's adherence to the minimization requirement of Title III. The government impermissibly limited respondents' ability to litigate these important claims and to cross-examine the monitoring agents who created the bootleg tapes. See United States v. Huss, 482 F.2d 38, 47-48 (2nd Cir. 1973).

The district court's ruling is based in large part upon its erroneous characterization of the government's misconduct as involving the "inadvertent" loss of evidence. D. App 67-68. See United States v. Bufalino, 576 F. 2d 446, 450 (2nd Cir. 1978). This conclusion was predicated upon the court's reliance upon self-serving affidavits belatedly filed by the 67 monitoring agents. D. App. 55-56, 63-64. The lower court chose to over-look the government's intentional use of a secret, independent cassette recording system and its failure to take rudimentary steps to preserve the recordings created by that system. The claim that some of the monitoring agents were unaware of the specific contents of the cassettes which were intentionally destroyed, cannot transform the government's practice into a "good faith" loss of evidence.

The court also erred in relying upon affidavits of agents never subjected to cross-examination. 12/ The district court gave substantial weight to those affidavits,

D. App. 55-56, 63-64, aggravating the prejudice resulting from the denial of the Sixth Amendment right to confrontation. Should this Court find it necessary to reach the issue of the bootleg cassettes, the district court's suppression order should be affirmed on that independent ground.

B. The Government's Demonstrated Practice of Eavesdropping Without Recording Violated Title III And Justifies Suppression of the Subject Tapes

Title III requires that the contents of all intercepted communications "...shall, if possible, be recorded on tape or wire or other comparable device." 18 U.S.C. Sec. 2518(8)(a). Respondents introduced substantial evidence that monitoring agents in this case engaged in a widespread practice of listening without recording, in contravention of the Fourth Amendment, the statute, court orders, and applicable FBI instructions. Despite the testimony of two agents who admitted on the witness stand that they listened without recording, the district court rejected the bulk of respondents' proof and denied their motion to suppress based on this independent ground.

Central to the respondents' proof of live monitoring was extensive evidence of simultaneous matching of television and radio stations carried out by the monitoring agents at each site. A radio and television were connected to a reel-to-reel recorder at each monitoring location to enable the agents to attempt to determine which radio or television station was being played in the target location. Once the agents matched their station with that being overheard, background noise could be filtered out. D. App. 72-79. Monitors were instructed to attempt to match radio and television transmissions each time the recorders were turned on. D. App. 79-80.

Respondents presented proof which established that on numerous occasions, monitors managed to match stations before initiating a spot check. Thus, even though the television channel or radio station within the target residence had been changed since the prior spot check, during a period when agents claimed not to have been listening at all, the agents were miraculously able to select the same station as that of their targets. The respondents' proof of was presented through cross-examination of monitoring agents, the government's own Title III logs, and charts prepared by defendants and paralegals.

For example on fifty (50) tapes exhaustively analyzed by the respondents, it was found that there were six hundred seventeen (617) recorded intercepts in which the sound of a television or radio was heard both in the surveilled premises and on the FBI channel used by the monitoring agents. Forty-eight (48) of those intercepts were from the Levittown residence tapes here at issue. Of those forty-eight (48) interceptions, the FBI agents managed to perfectly match the residence stations at the very beginning of each intercept, representing one hundred percent (100%) matching. It is particularly striking that twenty-three (23) of the intercepts which were perfectly matched involved channel changes since the previous overhears. Def. Exh. 2387A.

Of the thousands of entries on the charts, most of the data was derived from log entries made by FBI agents who indicated which television stations were being used. Several agents admitted such prescient matches, often involving three or more channel changes. No cogent explanation was ever offered by the government. 13/

In rejecting the respondents' claims of live monitoring, the district court utterly failed to consider the voluminous proof presented. Rather, the court dismissed the detailed

charts introduced into evidence because they had been prepared by members of the defense team and contained a small number of factual inaccuracies. 14/ The district court ruled that any violations of the recording provisions were de minimis and did not require suppression. This approach ignored the fact that the recording requirement is central to the enforcement of Title III. United States v. Giordano, supra, at 528. It is the preservation of intercepted conversations which enables reviewing courts to scrutinize the government's conduct of electronic surveillance. Without such recordings, for example, a court cannot properly evaluate the government's compliance with the minimization requirements of Title III. United States v. Abascal, 564 F.2d 821, 827 n.2 (9th Cir. 1977).

Listening without recording, as demonstrated by the evidentiary record in the instant case, transforms court-authorized electronic surveillance into an unconstitutional general search. The widespread violations of the recording requirement which occurred here warrant suppression of the fruits of the government's electronic surveillance. Should the Court find it necessary to reach this issue, the district court's suppression of these tapes should be upheld on this independent ground.

### III. PERJURY BY GOVERNMENT AGENTS

On October 20, 1986, during the suppression hearings, the government solicited affidavits from the electronic surveillance monitoring agents by means of an airtel which informed the agents that "the defense has accused the FBI of illegal arrests, illegal searches, the 'planting' and fabrication of evidence, and illegally intercepting conversations of the defendants, including the monitoring of conversations without recording, tampering of tapes and the erasure of portions of audio tapes." The airtel urged the agents to create a "basis to deny the defense motion to subpoenaing every agent." (Def. Exh. 2385) Most of the monitoring agents submitted the requested affidavits.

The affidavits provided by the agents contained false or inaccurate assertions that the agents "did not alter, erase, change or tamper with any tape in my possession or control." The majority of agents admitted to routinely creating and destroying bootleg cassettes. Particularly striking was the testimony of agents Tyler Morgan and Abelardo Alba.

Agent Tyler Morgan signed the draft affidavit attached to the October 20, 1986 airtel and had it notarized, but then crossed out his name and the name of the notary because he knew it was false to say that "I followed the procedure requiring that any conversation monitored be also recorded" or that "When I monitored any communication...recording equipment was activated simultaneously to record what was monitored." Rec. 12/4/87 Tr. 63-64. Agent Morgan testified that he completed the affidavit which he later defaced even though he knew that both he and Agent Abelardo Alba had live-monitored in violation of court orders. Rec. 12/8/87 Tr. 91-92. Agent Morgan further testified that he observed Agent Alba live-monitoring at the Vega Baja listening post, that

he knew live-monitoring was against court orders but that he did not report Alba's actions to any superior or to any government attorney. Rec. 12/9/87 Tr. 74. Morgan did not report the live-monitoring because he "...thought it would not come up" and did not think of it as a violation of law to submit false logs. Rec. 12/6/87 Tr. 82, 84. Agent Alba confirmed Morgan's testimony, admitting in his affidavit dated March 16, 1987, that he listened without recording. (Def. Exh. 2384-JJJ).

Significantly, Agent Morgan testified that he believed agents in addition to Agent Alba were live-monitoring as well. Thus, he testified that he would not have live-monitored "without believing that this was the method that others were using to monitor." Rec. 12/9/87 Tr. 54.

### CONCLUSION

As discussed above, lack of adequate custodial procedures which created opportunities for tampering, existence of physical characteristics of the tapes which raise doubts about authenticity, use of a secret recording system and subsequent destruction of the bootleg cassettes which it generated, listening without recording and admitted perjury by government agents, all bring into question the legitimacy of these tapes. These factors constitute independent grounds which justify sustaining the suppression of the tapes. The existence of all of these fact-bound issues makes this case one which does not present a clear cut vehicle for decision.

WHEREFORE, the petition for a writ of certiorari should be denied.

DATED: August 11, 1989

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### ENDNOTES

1/ Further evidence of the unreliability of the government's handling of original tapes was provided during the trial of five co-defendants of these respondents, which occurred during the pendency of the Second Circuit appeal on this matter. Special Agent Trace Kirk testified on February 14, 1989, that he removed original evidence tapes from the Elsur room vault "five or six times" over a period of a year. Each time, he gave the tape to an FBI language specialist who had been having difficulty making transcriptions from the corresponding duplicate original tape. Agent Kirk testified that there was no written documentation concerning the removal of the original tapes, names of language specialists were not listed on the chain-of-custody envelopes, he didn't know how long specialists kept the tapes, or what they did with them. 2/14/89 Tr. 114, 117. He also testified that he might have removed original tapes from the Elsur room without signing them out. Id. at 118.

2/ The equipment at each electronic surveillance location, except for the Datsun Sentra automobile, was set up so that two reel-to-reel recordings were made simultaneously with the intercept of any communication; one of the recordings was to be labeled "original" and the other "duplicate original."

3/ It was undisputed that undocumented stop/starts appeared on at least 22 of the Levittown residence "duplicate original" reels. For example, Levittown residence Reel #46 indicates that the tape recorder was turned off and on again 7 times, yet expert analysis revealed 23 separate stop/start episodes on that tapes. Rec. 3/28/88 Tr. 24; see also Rec. Vol. XXI, D. Exh. 2591.

4/ The chain-of-custody documents for Levittown Reels #6 and #7 are also problematic. While the ELSUR Clerk's initials and date were usually placed on the ELSUR evidence tape on the 504 envelopes, no date appears on the "ELSUR seal" for Reel #6. Although both were recorded on May 15, 1984, Reel #7 was kept overnight by a supervisor, delivered the next morning, and not sealed by the ELSUR Clerk until May 21, 1984, five days later. See D. App. 296.

5/ "...the Court's review shall be limited to the evidence tapes, those tapes which the government has designated for possible use in its case-in-chief." Gov. App 30a, fn. 3.

6/ The term "bootleg cassettes," used to describe cassette recordings created outside the parameters of Title III and not judicially authorized or sealed, is derived from the Report of the National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance (Minority Report) (1976), p.182.

7/ Special Agent Monserrate, the FBI technical agent who set up the equipment, testified that the cassette recorders, separately wired to the listening devices, could record conversations even when the reel-to-reel machinery was off or "minimized," as long as the "tape/input" switch on the

reel-to-reels was in the "input" position. Rec. 10/20/87, Tr. 232.

8/ On September 1, 1987, the first day of the Title III hearings, Case Agent Jose Rodriguez admitted that the government's widespread use of cassette recorders, ostensibly to make "work cassettes," had not been revealed previously "to keep questions from being asked about it." D. App. 275. Despite numerous defense discovery requests, beginning in November, 1985, for specific information about the recording equipment employed, the government never disclosed the use of the cassette recorders to make so-called "work cassettes" prior to Agent Rodriguez's testimony. In fact, a draft response prepared by the technical agent in October, 1986, had included that information. See, Record, XVIII, Def. Exh. 2411.

9/ The government did preserve and seal a small number of cassettes, denominated "A tapes," which were made to bridge gaps in conversations while the reels were being changed. Those tapes are not at issue here.

10/ The bootleg cassettes that correspond to telephone interceptions essentially match the corresponding reels. This is not surprising since telephone intercepts, unlike residential intercepts, were rarely minimized.

11/ In addition, two of the sealed "A tapes" for the Levittown residence had previously been used as bootleg cassettes. They too contain additional conversations not recorded on the corresponding reels. D. App. 49-62.

12/ The court arbitrarily allowed defendants to examine only 20 of the 67 Title III monitoring agents. The government introduced conclusory affidavits executed by all 67 of the monitors stating that they never "knowingly" recorded anything on the so-called work cassettes not appearing on the reel-to-reel tapes. See e.g., D. App. 301-302. The court relied heavily on those affidavits in reaching its legal conclusion that the loss of evidence was "inadvertent" and in "good faith." D. App. 67.

13/ A single example of the proof in the record below established the nature of the claim and the government's misconduct. Agent Luis Rivera was a monitor for Vega Baja residence Reel #192 on April 10, 1985. During a two-hour period, he conducted eight spot checks. The television was on a different channel from the preceding spot check each time. Despite the channel changes, he was able to match the FBI's television to the station playing in the target residence at the very moment each spot check commenced. D. App. 303-309; see also D. Exh. 2546. He admitted the matches and gave two possible explanations: (1) "coincidence" and (2) use of a "light meter" on the power amplifier. Rec. 2/4/88, Tr. 160-161; 2/5/88, Tr. 143. The latter theory was unique to Agent Rivera, unsubstantiated by the government, and entirely incredible. The court below refused to permit any test to be made of Agent Rivera's theory and then ignored Mr. Rivera's admissions of simultaneous matching, as well as his light meter theory.

14/ The prosecution identified fewer than ten of 991 instances identified by the defendants in which the defendants' claim of simultaneous matching was open to dispute. Moreover, the district court effectively prevented these indigent defendants from presenting their claim by

denying their request for funds to retain an expert to establish the statistical significance of the occurrences of simultaneous matching shown by the evidence. D. App. 286-293. The court's refusal to enable the defendants to present their case violated their constitutional rights to due process and equal protection. See p. 55, n. 48, *supra*.

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that the following parties have been served copies of the foregoing by mail this 11th day of August, 1989:

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